No. 79-856

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SENATOR GARRY GOLDWATER, ET AL., PETITIONERS

v.

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES, AND CYRUS VANCE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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We believe it important to reply to the Respondents' in terrorem argument, at pp. 8-9of their Brief in Opposition, that this Court must rule before January 1, 1980, "/o/therwise, the treaty will terminate on that date and, under international law, that termination will be irrevocable, regardless of any subsequent judicial holding that the United States' internal procedures for arriving at the decision to terminate were deficient."

This is simply not so.

The issue being litigated is whether the President possessed constitutional power to terminate the treaty without any kind of congressional concurrence. If he did not, his action was, and remains, ineffective as domestic constitutional law, unless and until that concurrence is obtained. An invalid act, challenged in pending litigation, does not acquire legitimacy by aging, during the time that the case is being considered in the courts. This Court's judgment reversing the court of appeals would have exactly the same effect if rendered in 1980 as it would have if rendered in 1979.

There is nothing in international law to the contrary. If the U. S. Constitution requires the concurrence of Congress, that is the end of the matter. Even if, contrary to fact, the Republic of China were for some reason seeking to rely on the President's notice of termination, Article 46 of the Vienna Convention on Treaties would put the ROC (and the international community) on notice, in view of the pendency of this litigation, that the defect in the President's constitutional authority "was manifest and concerned a rule of its /i.e., U.S./ internal law of fundamental importance," hence cannot be taken to be the act of the United States unless and until the deficiency is cured by congressional action. The fact, of course, is that the Republic of China promptly protested the termination as being in violation of international law (R. 171). See Appendix A to this Reply.

The answer to Respondents' resuscitation argument, that the judicial power could not order a terminated treaty back into effect, is in Article X of the Treaty itself. It says that "This treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other party." If the notice of termination has not been validly given in consequence of lack of congressional concurrence, the treaty, by its terms, remains operative indefinitely, and does not need to be "ordered back into effect."

The President could not impose "severe time restraints on this court" by an ultra vires act. If his notice of termination was ineffective, so also was the date that it prescribed.

The Court has jurisdiction to decide this case effectively at a time which suits its own convenience.

Respectfully submitted,

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December 8, 1979

APPENDIX A TO
PETITIONERS' REPLY TO BRIEF OF RESPONDENTS
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Taipei, December 31, 1978

Your Excellency,

The Government of the Republic of China has been given notice by the Government of the United States of the termination of the Mutual Defense Treaty one year after the date of January 1, 1979.

The Government of the Republic of China has scrupulously observed its obligations under the Mutual Defense Treaty, and has never violated any provisions of that treaty. For the U.S. Government to unilaterally give notice of termination for no justifiable ground is wholly unthinkable.

In accordance with the principles of international law, the cause and spirit constitute the basis of the provisions of a treaty. To terminate the Mutual Defense Treaty unilaterally without prior consultations violates the basic spirit of the provisions of the treaty.

There has been no vital change of circumstances since the signing of the Mutual Defense Treaty and the termination of the treaty can never be justified on the ground of rebus sic stantibus (the principle of changed circumstances).

The Government of the Republic of China deplores the unilateral termination of the Mutual Defense Treaty and lodges its strongest protest with the Government of the United States.

I avail myself of this opportunity to convey to Your Excellency the assurances of my highest consideration.

Tsiang Yien-si

Tsiang Yien-si
Minister of Foreign Affairs

His Excellency
Leonard Unger
Ambassador Extraordinary and Plenipotentiary
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